STATE OF MICHIGAN

COURT OF APPEALS

MAUREEN McDONNELL,

Plaintiff-Appellee,

v

AMERICAN NATIONAL RED CROSS, and WASHTENAW COUNTY BRANCH OF THE AMERICAN RED CROSS,

Defendants-Appellants.

UNPUBLISHED
June 29, 2004

Nos. 243320; 245043
Washtenaw Circuit Court
LC No. 01-000073-NO

Before: Kelly, P.J., and Murphy and Neff, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by leave granted the circuit court's denial of their motion for summary disposition of plaintiff's negligence and medical malpractice claims arising from her fall at a Red Cross blood drive after she donated blood.[1] We affirm in part, reverse in part, and remand for further proceedings.

I

On May 28, 1999, plaintiff, a University of Michigan graduate student, gave blood at a Red Cross blood drive conducted at the Michigan Union by defendant Washtenaw County Branch of the American Red Cross. After her donation, plaintiff fainted while walking from the blood donation table to the snack table, falling onto a stone floor. As a result of the fall, plaintiff allegedly suffered symptoms of post-concussion syndrome, including migraine headaches, dizziness, nausea, anxiety, and fatigue, which she claims affected her earning capacity and her enjoyment of life and activities, including her progress toward attaining a doctorate degree.

Although the factual circumstances in this case are fairly straightforward, the procedural background is complicated. In pursuing her claim, plaintiff filed two separate complaints. She

[1] In Docket No. 243320, defendants appeal from an August 9, 2002 order of the circuit court, denying their motion for summary disposition. In Docket No. 245043, defendants appeal from a November 5, 2002 order denying their renewed motion for summary disposition.

initially filed a negligence complaint,[2] LC No. 01-000073-NO, against defendants on January 19, 2001, which defendants removed to federal court. She later filed a second complaint on September 17, 2001, alleging a claim of medical malpractice, LC No. 01-001066-NM.

After the parties stipulated to a remand to state court of plaintiff's negligence complaint, the circuit court granted defendants' motion for summary disposition of plaintiff's medical malpractice complaint. The trial court thereafter granted plaintiff's motion to amend her initial complaint to include a count for medical malpractice.[3]

Defendant then sought summary disposition of the amended complaint. Defendant argued that the negligence claim must be dismissed because it was in fact a claim of medical malpractice. Further, plaintiff's medical malpractice claim must be dismissed because it was barred by the statute of limitations, MCR 2.116(C)(7), and because plaintiff failed to meet the statutory requirements for filing a malpractice claim, including a notice of intent and an affidavit of merit, MCR 2.116(C)(8), (10).

The trial court denied defendants' motion for summary disposition, noting that dismissal on the grounds sought would be patently unfair in that the court had previously granted defendants' motion to dismiss the medical malpractice complaint, which was properly filed, on the ground that another action was pending, MCR 2.116(C)(6). Defendants subsequently filed a renewed motion for summary disposition, following this Court's decision in *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002), which the trial court also denied. These appeals followed.

II

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998); *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek, supra* at 337. A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Id.* Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

Summary disposition is properly granted under MCR 2.116(C)(7) when an action is time-barred. *Young, supra.* This Court reviews the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations, except those contradicted by documentary evidence, as true. *Id.* at 450. "'[A]bsent disputed questions of fact, whether a cause of action is barred by a statute of limitations is a question of law that this Court also reviews de novo.'" *Id.* (citation omitted).

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[2] Plaintiff stated her theories as negligence and premises liability.

[3] It is not clear from the record why the two cases were simply not consolidated.

III

Defendants argue that the trial court erred in denying their motions for summary disposition essentially because both counts of plaintiff's amended complaint stated claims for medical malpractice, even though one count was labeled ordinary negligence, and plaintiff failed to meet the statutory requirements for filing a medical malpractice claim. Our review of plaintiff's amended complaint persuades us that plaintiff set forth a claim of ordinary negligence in her original complaint and therefore the statutory requirements for filing a medical malpractice claim are inapplicable. But we agree that plaintiff failed to meet the statutory requirements with regard to the medical malpractice count, added by amendment, and therefore defendants were entitled to summary disposition of that count.

A

The standard for distinguishing between a claim of ordinary negligence and a claim of medical malpractice is well-settled:

> The determination whether a claim will be held to the standards of proof and procedural requirements of a medical malpractice claim as opposed to an ordinary negligence claim depends on whether the facts allegedly raise issues that are within the common knowledge and experience of the jury or, alternatively, raise questions involving medical judgment. [*Dorris v Detroit Osteopathic Hosp Corp,* 460 Mich 26, 46; 594 NW2d 455 (1999).]

A party cannot avoid the procedural requirements of a malpractice action by framing a claim as ordinary negligence. *Id.* at 43. Conversely, where a complaint alleges ordinary negligence, the statutory requirements for medical malpractice do not apply.

When the same set of facts can support either of two distinct causes of action, the determination of which law to apply depends on the theory actually pleaded. *Adkins v Annapolis Hosp,* 116 Mich App 558, 563; 323 NW2d 482 (1982). "The gravamen of an action is determined by reading the claim as a whole." *Id.*

Plaintiff's amended complaint alleged that defendants breached a duty of reasonable care to plaintiff, a business invitee. Specifically, plaintiff alleged:

> 102. Defendants Red Cross and Washtenaw County Branch of the Red Cross had a duty to Plaintiff as a business invitee to exercise ordinary care to protect persons such as Plaintiff from foreseeable risks of injury.
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> 103. Defendants Red Cross and Washtenaw County Branch of the Red Cross knew, or should have known, that it is common for a person who has donated blood to experience a period of dizziness, "wobbliness," on their feet or lightheadedness during and/or after the blood donation process.
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> 104. Defendants breached their duty to Plaintiff in the following ways:

A. Its workers were more concerned about their lunch hour being delayed than they were about Plaintiff's safety and well-being.

B. They did not escort Plaintiff from the blood donation table to the snack table.

C. They did not provide any device or other support to assist Plaintiff in moving from the blood donation table to the snack table.

D. They did not tell Plaintiff to not walk from the blood donation table to the snack table by herself.

E. They specifically instructed Plaintiff to walk from the blood donation table to the snack table by herself.

F. They failed to respect Plaintiff's right to have the procedure done carefully.

Based on the pleadings, we agree with plaintiff that she set forth a claim of ordinary negligence.

Plaintiff's allegations speak to defendants' conduct as the organizer of the event, i.e., the blood drive, rather than to the professional judgment exercised by medical personnel who drew her blood. Reading the claim as a whole, plaintiff's complaint does not allege negligence in the medical procedures undertaken, but rather with the general safety and operation procedures surrounding the blood donations. For example, plaintiff does not claim that an escort was warranted because of her particular medical circumstances. Nor does she allege that the attending nurse failed to properly assess plaintiff's medical condition. The gravamen of the complaint is that defendants were negligent in the operation and oversight of the blood drive.

In moving for summary disposition, defendants argued that the definition of medical malpractice considers whether the issue involves medical judgment. Thus, defendants contend that because drawing blood is a medical procedure and the evaluation of a donee's reaction is a matter of medical judgment, this case is one of malpractice. We would agree if the claims asserted involved either the medical procedure attendant to plaintiff's blood donation or the attending nurse's medical assessment of plaintiff's reaction, but that is not the case. Plaintif's claims instead are based on, and therefore limited to, defendants' overall conduct in carrying out the blood drive.[4]

[4] According to plaintiff's brief on appeal, this "case implicates the simple issue of whether Defendants should have escorted Plaintiff to the snack table after the blood donation process was complete."

No expert medical testimony is required to establish whether defendants exercised ordinary care, for example, in routinely providing escorts from the blood donation table to the snack table. Similarly, in his deposition testimony, Dr. Bruce Newman, medical director American Red Cross Blood Services, Southeastern Michigan Region, stated that it did not require medical or professional judgment to ask a person how she feels. Newman further stated that escorting donors to the snack table was a safety measure, but escorts were not guaranteed, in part because the number of volunteers available was unpredictable. To the extent, then, that a claim is premised on these circumstances, the claim would sound in ordinary negligence.

Our conclusion is not altered by the fact that some aspects of the pleadings potentially support a claim of medical malpractice, because plaintiff's claim of ordinary negligence in this context is self-limiting. That is, plaintiff's case may not be premised on a violation of the standard of care for medical treatment. Her proofs will necessarily be limited to the ordinary negligence pleaded.

B

With regard to Count II of plaintiff's amended complaint, medical malpractice, we conclude that defendants were entitled to summary disposition. Plaintiff failed to adhere to the statutory requirements in filing her medical malpractice claim in her amended complaint.

The limitation period for a malpractice action is governed by MCL 600.5805(6)[5] and MCL 600.5838, which require commencement of a suit within two years of when the claim accrued or within six months of the time the asserted malpractice is or should have been discovered, whichever is later. *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 219-221; 561 NW2d 843 (1997). A potential plaintiff must wait at least 182 days after giving notice of intent to sue before filing a complaint. MCL 600.2912b(1). However, if a defendant fails to respond to the notice of intent within 154 days, a plaintiff may file a complaint immediately and need not await the expiration of 182 days. MCL 600.2912b(7), (8); *Omelenchuk v City of Warren*, 461 Mich 567, 572-573; 609 NW2d 177 (2000).

Serving a potential defendant with a notice of intent under MCL 600.2912b may toll the limitations period to accommodate the 182-day notice period. MCL 600.5856(d). However, the period of limitations is not tolled by a notice of intent if the notice of intent to sue does not comply with MCL 600.2912b. *Rheaume v Vandenberg*, 232 Mich App 417, 421-423; 591 NW2d 331 (1998).

Further, a plaintiff commencing a medical malpractice action must file both a complaint and an affidavit of merit. MCL 600.2912d; *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). The affidavit of merit is mandatory and imperative. *Id.* The mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit and does not toll the limitations period. *Id.* MCL 600.2912d(2) allows a twenty-eight-day extension

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[5] The subsection governing malpractice actions was formerly MCL 600.5805(5), but was renumbered by a recent amendment, 2002 PA 715.

in instances where an affidavit cannot accompany the complaint. *Scarsella, supra* at 549; *Holmes v Michigan Capital Medical Ctr*, 242 Mich App 703, 708-709; 620 NW2d 319 (2000).

Here, the two-year period of limitations for a medical malpractice action arising from the May 28, 1999, incident in this case would have expired on May 28, 2001. However, plaintiff sent a notice of intent to file a medical malpractice claim against defendants on March 19, 2001, ten weeks before the period of limitations was set to expire. The period of limitations was tolled during the 182-day period. Hence, the tolling period ended September 17, 2001. Because defendants did not respond to the notice of intent within 154 days, plaintiff properly filed her complaint and affidavit of merit in the medical malpractice case, LC No. 01-001066-NM before the expiration of the 182-day period, on September 14, 2001.

However, plaintiff filed the medical malpractice count in her negligence case, LC No. 01-000073-NO, on March 22, 2002, well after the remaining ten weeks of the limitations period had passed. Moreover, plaintiff did not file her amended complaint in LC No. 01-000073-NO with a copy of the affidavit of merit. She filed the affidavit of merit on April 22, 2002, more than 28 days after filing the medical malpractice count and without seeking leave of the trial court for an extension.

The trial court essentially resolved these procedural deficiencies by reasoning that plaintiff's alleged compliance with the statutory requirements for filing a medical malpractice claim in LC No. 01-001066-NM was sufficient for finding compliance in LC No. 01-000073-NO. The court noted that it granted defendants' motion for dismissal of plaintiff's medical malpractice complaint, LC No. 01-001066-NM, on the basis that another action was pending, given the federal court remand of plaintiff's negligence case. The medical malpractice complaint was properly filed. The court later permitted the medical malpractice claim to be added to the negligence complaint, and it would be patently unfair to now dismiss the medical malpractice claim on the basis that it was improperly filed.

Even if, under the unique procedural circumstances of this case, the statutory filings in the medical malpractice case could be viewed as satisfying the requirements with regard to the permitted amendment of plaintiff's negligence complaint, in our view, plaintiff's failure to, at a minimum, refile the affidavit of merit with her amended complaint, precludes such a result. Where a plaintiff "wholly omits" to file an affidavit of merit and the limitations period has expired, dismissal with prejudice is appropriate. *Scarsella, supra* at 549, 552-553.

Plaintiff failed to preserve her previous compliance with the statutory requirements for filing a medical malpractice claim. Although she filed an appeal in this Court of the dismissal of her medical malpractice case, she subsequently voluntarily dismissed the appeal. We therefore reverse the trial court's denial of defendants' motion for summary disposition of the medical malpractice count.

C

Defendants further claim that plaintiff's malpractice action must be dismissed because the affidavit of merit and notice of intent were fatally deficient and because a suit for medical malpractice may be brought only against a state licensed health care professional and/or a state licensed health facility or agency, MCL 600.5838a(1), and plaintiff named no such defendants. Having concluded that plaintiff's medical malpractice claim was time-barred, we do not address these remaining grounds for dismissal.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Janet T. Neff